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No. 973

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

OIL, CHEMICAL AND ATOMIC WORKERS
INTERNATIONAL UNION, AFL-CIO

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

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In their briefs in opposition to the petition, respondents both contend that the Board in this case found as a fact that the Company locked out its employees *solely* in support of its legitimate bargaining demands. Therefore, they argue, this case does not present the question of whether a lockout in support of *both* mandatory and nonmandatory demands is an unfair labor practice. This argument, we submit, is based on a distorted reading of the Board's decision.

The Board found that the Company had *insisted* on its nonmandatory demand that the laboratory and warehouse employees be excluded from the bargaining unit. There is absolutely no ambiguity in this aspect of the Board's de-

cision. Indeed, it was on the basis of this finding that the Board held that the Company had committed an unfair labor practice. As stated in the Board's brief to this Court, the Board "reaffirmed its initial finding, and order based thereon, that the Company's insistence upon the exclusion of the laboratory and warehouse employees from the unit was unlawful." (NLRB Br., p. 7.)

Since the Company continued to insist upon this unlawful demand throughout the negotiations, there can be no question that one purpose of the lockout was to force acceptance of this demand. Indeed, the Board expressly so found. In its supplemental decision, the Board adopted the trial examiner's finding that the lockout was "designed to bring economic pressure on the Union to compel it to sign a contract *on its terms*." (App. 38-39; emphasis added.) One of those terms, of course, was the exclusion of laboratory and warehouse employees from the bargaining unit.

There is thus no substance whatever to the contention that the Board found the lockout to be *solely* in support of the Company's legitimate demands. On the contrary, the Board expressly found that the purpose of the lockout was to force acceptance of *all* of the Company's proposals.

The Board did say that the parties were at an impasse on the legitimate issues as well, and that the Company's nonmandatory demand "did not contribute to the impasse between the parties on such issues." The Board also observed that these issues were "items which both parties deemed to be of fundamental importance." "In view of these circumstances," the Board concluded, "Respondent would have locked out its employees even if the issue as to the unit status of laboratory and warehouse employees had been withdrawn from negotiations, and we find that Respondent's position on that issue did not materially motivate its decision to lock out its employees." (App. 40-41.) On this basis, the Board held that the lockout itself was not an unfair labor practice.

But the finding that the Company would have locked out in any event, and that the nonmandatory demand did not *materially* motivate the lockout, is not the equivalent of a finding that the lockout was *solely* in support of legitimate demands. Rather, what the Board was saying was that the lockout was not solely or primarily designed to force acceptance of the nonmandatory demand—even though that was one of its objectives.

Thus, this case raises precisely the question stated in the petition—whether a lockout in support of both mandatory and nonmandatory demands is an unfair labor practice, regardless of whether the Company would have locked out in any event to force acceptance of its legitimate proposals. As we have already demonstrated in the petition, this is an important question of law, and one on which there now appears to be a conflict among the circuits.

It is noteworthy that neither the Company nor the Board denies the importance of this question or the existence of this conflict. Their sole argument, rather, is that the question is not raised on this record. However, as we have demonstrated above, the question is squarely presented on the facts *as found by the Board*.

CONCLUSION

For the reasons stated herein and in the petition, the writ of certiorari should be granted.

Respectfully submitted,

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